Supreme Court, U. S.
FILED
AUG 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-72

WALTER COX,

Petitioner,

—against—

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I

Following the opinion of *Canizzo* which was critical of the *Cox* decision and revealed the disagreement between the various judges, the Second Circuit decided *Lopez* v. *A/S D/S Svendborg and D/S of 1912 A/S*, Docket No. 78-7046 (July 24, 1978). The Opinion is not yet officially reported and it is set forth in Respondent's brief in their Appendix.

The three-judge panel there was unanimous in its disagreement with the *Cox* decision and characterized the confusion that exists as follows:

> "The recent decision in *Cox* v. *Flota Mercante Grancolombiana, S.A.*, No. 77-7338 (2d Cir. May 10, 1978),

reversed a jury verdict in favor of Cox, a longshoreman, against the ship on the ground that it was the stevedore's duty alone as an independent contractor to remedy unsafe conditions. The *Cox* decision was handed down in 'the face of known disagreement by a majority of [the] panel' in *Canizzo, supra,* which *upheld* a jury verdict for a longshoreman against a ship and included a comment on *Cox's* contrary view.'

This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law. Because of the different views as to whether an employer's failure to remedy a dangerous condition is a defense to a suit by the longshoreman against a ship for its own negligence, we feel that it may not be amiss to explain why we do not agree that the failure of the stevedore to remove or provide protection against the conditions created by the shipowner relieves the latter of liability for injuries to a longshoreman caused by those conditions." (Respondent's Appendix, pp. 23a-25a).

Shipowner, in *Lopez,* suggested an En Banc hearing to hear argument of the appeal, rather than having it heard by a three-judge panel. The suggestion was denied. Since the Opinion, another suggestion for an En Banc hearing has been made but there is no determination as yet.

Although *Canizzo* and *Lopez* find *Cox* in conflict with those cases as well as *Lubrano, Napoli* and *Landon,* shipowner here finds no conflict or confusion citing a District Court Judge as proof thereof.

The Opinion of Judge Charles L. Brieant in *Leon Karczewski* v. *Flota Mercante Grancolombiana, S.A.,* 77 Civ.

4193, which is not yet officially reported, and is set forth in the Appendix to this Reply, shows clearly the results of confusion in the District Court.

Respondent refuses to face the position of the Fifth Circuit on concurrent negligence, which is directly contrary to *Cox.* In *Samuels* v. *Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir., May 26, 1978), the Court upheld the right of a longshoreman to recover in full against the steamship company when both shipowner and stevedore were concurrently negligent. The Court there said at page 889:

> "To permit the employer's negligence to reduce the joint tortfeasor vessel's liability would reduce the award of plaintiff, the one person who is blameless. The innocent victim of concurrent negligence would find that, through some (to him inscrutable) judicial attempt to achieve equity for other parties, he must accept a partial loaf of compensation for the full loaf of joint and several liability."

In *Wiles, Jr.* v. *Delta Steamship Lines, Inc.,* 574 F.2d 1338 (5th Cir., June 15, 1978), the Court of Appeals approved of *Samuels* and held that:

> "(1) a vessel owner may be liable for an open and obvious danger if the invitee-longshoreman is not in a position to fully appreciate the risk or to avoid the danger even if aware of it, and (2) if the vessel owner is found to be negligent, the question of whether the longshoreman was himself negligent must also be considered under application of the admiralty rules of comparative negligence." (P. 1338).

The Court also remanded for further consideration the issues: "—(1) was the vessel owner negligent, and (2) if so, was the plaintiff himself (as distinguished from his employer) also negligent." (P. 1339).

The Ninth Circuit agrees with the Fifth Circuit and the Second Circuit (minus *Cox*) and in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669, 9th Cir. 1975, cert. den. 1976, 425 U.S. 944, the Circuit Court held that a longshoreman, who has received injuries caused by the concurrent negligence of his stevedoring employer and the shipowner, can recover the full amount of his damages from the shipowner.

II

Respondent distorts the meaning of the amended statutes, Congressional intent and case holdings in its attempt to show no conflict or inconsistencies between *Cox* and other cases. To achieve this result, they claim that the unsafe condition was created by stevedore and then misinterpret various opinions that such creation alone relieves shipowner of liability.

It is pointless to go into the multiplicity of distortions set forth by Respondent as they are in the main irrelevant to this proceeding for the writ. However, the following should be noted:

1. (a) The issues of law upon which *Cox* is based has nothing to do with "creation".

(b) "Creation" alone is not a basis for relieving shipowner of its negligence.

(c) Shipowner urged the same theory of "creation" in the Circuit Court and the *Cox* opinion ignores this theory completely, obviously not adopting it. It should be noted that *Lopez* interprets *Cox* as pertaining to an unsafe condition created by *the shipowner,* which it actually was.

(d) Shipowner furnished a hatch with unsecured beams and inadequate beam locks, requiring pins. The pins were ship's equipment and the ship's crew was supposed to and agreed to supply and insert them but failed to do so. This is the unsafe condition that shipowner claims was "created" by stevedore because they continued to work. Shipowner engages in bald distortion of fact and definition. The condition causing the accident was simply a dangerous one, caused, created and maintained by shipowner. It definitely was not created by stevedore.

2. Shipowner finds significance in the alleged fact that four cases were remanded to the District Court for "further findings". This is a mistake. *Lubrano* had not been allowed to go to the jury and had to be returned for a new trial. *Lopez* was remanded for a new assessment of damages only. *Landon* was an appeal from the dismissal of a third party complaint by shipowner against stevedore. The *Napoli* trial ended in a defendant's verdict and on appeal was reversed and remanded for a new trial with a proper charge. Parenthetically, the conditions complained of in *Napoli* did not exist prior to stevedore boarding the vessel.

Either shipowner is confused or seeks to muddy the waters and prolong the confusion.

3. There is no basis for the claim that the amended statute limited and narrowed the standard of care applicable to shipowner.

The Senate Committee report pertaining to the amendment, in speaking of the example of an oil spill on the deck causing injury, states that to recover the longshoreman must establish—"or 2) the foreign substance had been on the deck for such period of time that it should have been discovered and removed by the vessel in the *exercise of reasonable care* by the vessel under the circumstance". Pp. 10-11. (Emphasis supplied)

The Senate Report also sets forth that the Committee intends that "—an employee injured on board a vessel shall be in no less favorable position vis-a-vis his rights against the vessel as a third party than as an employee who is injured on land—". P. 11.

The Senate Report at Page 2 refers to longshoring as a "high risk occupation". "Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations" (Page 2) and at Page 12 states "—manufacturing remains one of the most hazardous types of occupations".

Thus, the standard of care is reasonable care under the circumstances. Ingrained in our common law of negligence is the concept that the greater the risk the higher the degree of care required of the landowner to its invitees. As is set forth in W. Prosser, Law of Torts, Section 34, at 180, "The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it".

Since Congress itself characterized longshoring as high risk and one of the most hazardous types of occupations,

and since shipowner must exercise reasonable care, the degree of the standard of care is necessarily a high one, not limited or narrowed.

There is no basis for shipowner claiming a reduction or lessening of the standard of care on their part.

III

The remarks by respondent with respect to Workmen's Compensation benefits and the compromise effected in the amending of the statute is *not* set forth as Congress intended. *In Samuels* v. *Empresa Lineas Maritimas Argentinas, supra,* the Circuit Court said:

> "The fundamental Congressional aims in 1972 were two-fold: (1) eliminate the unseaworthiness action but leave in its stead a negligence action with promotion of shipboard safety as a primary focus; (2) eliminate any form or vestige of the shipowner's attempt to shift liability (in whole or in part, directly or indirectly) to the stevedore. *See Robertson, supra,* 7 J.Mar.L. & Com. at 484-85." (P. 888).

The increase in compensation benefits was not to substitute in place of a cause of action in negligence against shipowner; nor was the amount of the benefit based on magnanimity. The rates were based on the average weekly national average and in no event more than two-thirds of the injured longshoreman's average wage.

Limiting the injured longshoreman to Workmen's Compensation is depriving him of a substantial economic right which he has in the suit against shipowner for negligence.

The more severe the disability, the greater his economic loss if limited to compensation.

That was not the intent of Congress. See *Canizzo*, *Lopez*, *Wiles* and *Samuels*.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari, in the interests of justice, should be granted.

Respectfully submitted,

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APPENDIX

Endorsement

Leon Karczewski, Plaintiff v. *Flota Mercante Grancolombiana, S.A., Defendant.*

77 Civ. 4193—CLB.

Since this motion was served and filed, the Court of Appeals has issued two decisions: *Cox* v. *Flota Mercante Grancolombiana, S.A.*, Dkt. No. 77-7338, decided May 10, 1978, and *Canizzo* v. *Farrell Lines, Inc.*, Dkt. Nos. 77-7292, 77-7332, decided June 2, 1978. In *Canizzo*, Judge Friendly, dissenting in part, noted that the two cases are not consistently decided and that "our district judges can scarely be expected to function with so discordant a chorus on this court."

As a matter of discretion, the Court declines to grant summary judgment here unless and until there is a further elucidation of the apparent conflict. Motions for summary judgment are addressed to the discretion of the Court. *Petition of Bloomfield Steamship Co.*, 298 F.Supp. 1239, 1242 (S.D.N.Y. 1969), *aff'd.* 422 F.2d 728 (2d Cir. 1970). This case can best be resolved on a full trial record.

The motion is denied, with leave to renew in the event of a further pronouncement by the Court of Appeals.

So Ordered.

Dated: New York, New York
June 6. 1978

CHARLES L. BRIEANT
U.S.D.J.